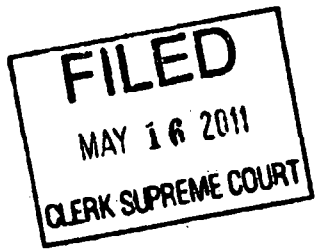
IN THE SUPREME COURT OF IOWA

NO. 11–0095

AMERICAN CIVIL LIBERTIES UNION OF IOWA FOUNDATION, INC.,
Appellant-Petitioner,

v.

RECORDS CUSTODIAN, ATLANTIC COMMUNITY SCHOOL DISTRICT,
Appellee-Respondent



APPEAL FROM THE IOWA DISTRICT COURT FOR CASS COUNTY
THE HONORABLE RICHARD H. DAVIDSON, PRESIDING
EQCV 024042

REPLY BRIEF

FOR PETITIONER/APPELLANT

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Statement of Issue Presented for Review

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ARGUMENT

I. Whether this court is precluded from providing a *de novo* review and decision.

The school district's principal argument in this case rests upon the district court's judgment call. The court below characterized the requested description of the disciplinary sanctions as "confidential," "in house job performance documents exempt from disclosure." [App. 46]. The school district now "asserts that this case is to be reviewed for errors of law, with all findings of fact made by the district court binding upon the appellate court." [Appellee's Brief, p. 7]. Later, in its appellate brief, the school district uses this limited view of appellate authority to argue that the merits should not be decided on appeal. [Appellee's Brief, p. 29-31]

Understandably, the school district would like to insulate the trial court's ultimate conclusion that the ACLU of Iowa is seeking "in house job performance documents" from appellate revision, but the authorities cited in support of such limited review are wanting. The case, which the school district relies on, is Christy v. Miulli, 692 N.W.2d 694,*699 (Iowa 1999).

At the outset, it can only be noted that *Christy* was a wrongful death suit heard not in equity, but at law. So that case starts off as being an unlikely source of authority for the scope appellate review in an equitable

proceeding. Nowhere on the cited page (699) of *Christy* or indeed anywhere in the opinion does there appear to be support for the proposition that "all findings of fact made by the district court [*are*] binding upon the appellate court." [*quoting from* Appellant's Brief, p. 29]

The school district also cites Iowa R. App. P. 6.904(3)(a) (2011) for the same point. Again, in addition to slightly overstating the power of the asserted rule, the school district ignores the difference between the review of equity cases and review of ordinary actions at law. "Cases commenced under Iowa Code chapter 22 are ordinarily triable in equity, thus calling for *de novo* review on appeal." Clymer v. City of Cedar Rapids, 601 N.W.2 42,*45 (Iowa 1999). The appropriate standard for factual review should be that stated in Iowa R. App. P. 6.904(3)(6) (2011), "...the court gives weight to the fact findings of the district court, but is not bound by them."

More precisely to the point, this is an appeal from a summary judgment record in which the parties have not disputed the facts on the ground. What is in contention is the district court's ultimate conclusions which are a mix of fact and law—both of which remain fully subject to this court's *de novo* review on appeal.

II. Iowa Code §22.7(11) does not create a *per se* exception for disciplinary records.

There is nothing axiomatic about the school district's presumption that disciplinary sanctions are "in house job performance documents exempt from disclosure." Real life examples prove otherwise. For instance, public records published on the internet, show that in 2005 the Iowa Board of Educational Examiners punished an Iowa educator with a Letter of Reprimand in response to his role in directing the "conduct of [*an*] illegal strip search of [*a*] student."[1] *See,* Iowa Code § 272.13 {"...A final written decision and finding of fact of the board in a disciplinary proceeding is a public record."} In State v. Garrison, 711 N.W.2d 732, 2006 WL 138280 page 19 (Iowa App. 2006), the Iowa Court of appeals chose to publish the fact that a DCI agent had been suspended for twenty days for on the job misconduct. The Iowa Supreme Court has several times authorized the release of records relating to employee performance. *E.g.,* promotional test scores[2], complete investigations in to misconduct,[3] and sick leave records.[4] Similarly, the U.S. District Court for the Northern District of Iowa has determined that the entire personnel file of an employee may be subjected to

[1] See, https://www.iowaonline.state.ia.us/boee/controller.aspx.

[2] DeLaMater v. Marion County Civil Service Comm'n, 554 N.W.2d 875 (Iowa 1996)

[3] The Hawkeye v. Jackson, 521 N.W.2d 750 (Iowa 1994) However, the Hawkeye decision did not consider the possible effect of Iowa Code §22.7(11) which was not raised in defense.

[4] Clymer v. City of Cedar Rapids, 601 N.W.2 42 (Iowa 1999)

the *DeLaMater* balancing analysis. Shannon v. Koehler, 2010 WL 3943661 (N.D. Iowa 2010).

In its opening brief the Appellant ACLU of Iowa challenged the school district to identify the source of law whereby school teachers, unlike most other professions, have a right to keep their disciplinary records hidden from public view. It appears that the school district has decided to rely only upon the one exception in Iowa Code §22.7(11), *viz.*:

> Iowa Code Section 22.7(11), in and of itself, creates an expectation of privacy and confidentiality.... there remains no further need to justify, through the Constitution, unrelated statutes or case law that the facts of the present case create an expectation of privacy.... [*N*]o public employer is required to demonstrate...that the employee had an expectation of privacy to the records at issue.

[Appelee's Brief, p.27]

While subsection 11 recognizes the potential that some material in personnel files may be legally deserving of confidentiality, it provides no substantive criteria for making that distinction. Thus, both state and federal courts in Iowa have continued to recognize the necessity of applying a balancing test. *E.g., DeLaMater, Clymer, Shannon.*

Iowa Code 22.7(11) thus stands at the beginning rather than at the end of the inquiry into whether disciplinary measures can be treated as legally

confidential and whether in the particular circumstances of this case any such claims can be allowed to persist. In the journey between, it is, indeed, the school district's legal and factual burden to establish that an exemption both applies and has not been destroyed by the facts of the case.

At pages 25 and 26 of its appellate brief, the school district argues that the ACLUF has distorted the case law by asserting that a party seeking exemption to the open records statute under Iowa Code § 22.7(11) must factually support its entitlement to that exception. The school district does not explain why the ACLUF's position is a stretch, but the logical end of its argument would be to treat the confidential personnel information exception under Iowa Code §22.7(11) differently from other enumerated exceptions. No special proof would be required to show the exception applies.

The fallacy of this special treatment is that the nebulous language of the confidential personal information exception[5] provides no bright lines for interpreting it in such an absolute or automatic terms. Moreover, Iowa Code sections 22.8 and 22.10 clearly place the burden of proving entitlement to the benefit of an exception upon the party resisting disclosure. "Disclosure is the rule, and one seeking the protection of one of the statute's exemptions

[5] "Iowa's personal records exemption, section 22.7(11), does not list examples of "personal records," nor does it define that term. Consequently, we have followed the federal cases and employed a balancing test in applying this exemption...." *DeLaMater* at 879.

bears the burden of demonstrating the exemption's applicability." Clymer, 601 N.W.2d at 45; *Cf., DeLaMater* at 879 {"We also held that the requested information, in the absence of evidence to the contrary, did not constitute 'personal information that the right of privacy would protect.'" *quoting* City of Dubuque v. Telegraph Herald, Inc., 297 N.W.2d at 526}. Both *Clymer* and *DeLaMater*—cases which are well known to the school district in this litigation—dealt directly with the exception for "personal information in confidential personnel records" contained in Iowa Code § 22.7(11). Authoritative precedent defeats the school district's assertion that it had no particular evidentiary burdens beyond claiming the exception.

The complete burden of the school district then was to establish that a description of the discipline imposed by the school district was both "personal information" and part of a "confidential personnel record." The ACLUF interprets "personal information" as information that is truly private in character and of no legitimate public importance. *Compare, Clymer* at 47 noting that certain releasable personnel information was not "information deemed by other courts as personal or intimate, such as an employee's medical condition...."

The reference to confidentiality depends as we know, not upon the location of the record, but upon its character. *DeLaMater* at 879. If a legal

basis for holding a particular piece of information "confidential" cannot be found then there is little support for the exception.

If a person who could be expected to object to the public disclosure of requested information remains silent (as they have in this case), or the "cat is already out of the bag" (which is also true in the present case), any "personal" or "private" character of the information sought may be lost. Both of these propositions are validated by previous Iowa cases. *E.g.,* The Hawkeye v. Jackson, 521 N.W. 2d 750,*753 (Iowa 1994) {construing a different exception involving "confidentiality" to be unavailable where only feeble concerns about disclosure were raised}; *DeLaMater* at 881{Public already knew most of the story concerning test performances of successful candidates so records would be released}.

The school district did not meet its evidentiary and legal burdens to show that a description of the discipline imposed on two Iowa educators who conducted illegal strip searches of students was confidential under Iowa code § 22.7(11).

III. A preliminary showing of need or merit is not required under the *DeLaMater* balancing analysis.

The school district asserts that the ACLUF has unfairly accused the school district of condoning the strip searches; has failed to offer "evidence supporting or even suggesting that the School District failed to properly discipline the employees; and has not even asked for enough information to be credible in its legal efforts. [Appellee's Brief, pp. 32-33] These arguments are, of course, irrelevant. All individuals are entitled to the same information under Iowa's open records statute no matter who they are or what interest brings them to the courthouse. This principle has already been affirmed by the Iowa Supreme Court:

> We note that some of the foregoing cases contained facts yielding a hint or "tip" of payroll abuse by public officials, a feature relied upon by the district court to distinguish them from the case before us. ... We find the factual distinction irrelevant. The issue is whether the information falls within an exemption from chapter 22's general rule of disclosure, and not whether the public-or its surrogate-suspects abuse before requesting such information.

Clymer at p. 46-7

—∞—

CONCLUSION

The decision on the merits below should be reversed and judgment for the Plaintiff should be granted with a provision for reasonable attorney's fees and costs as required by Iowa Code §22.10(3)(c).

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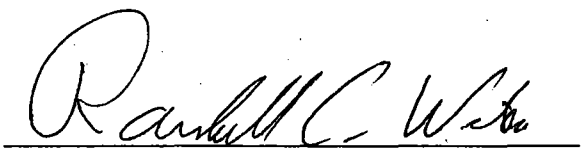

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